No. 161

In the Supreme Court of the United States

OCTOBER TERM, 1944

NATIONAL METROPOLITAN BANK, A CORPORATION,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The judgment of the District Court (R. 23–24) was entered without an opinion. The opinion of the Court of Appeals (R. 30–33) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 1, 1944 (R. 34). The petition for a writ of certiorari was filed June 14, 1944. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

A vouchering officer of the United States during a period of 28 months fraudulently procured the issuance of checks to the order of named payees, forged their signatures as endorsements, and cashed the checks. Petitioner bank endorsed the checks, guaranteeing prior endorsements, and collected and transmitted the proceeds. In an action by the United States to recover from petitioner, the questions presented are:

(1) Whether failure of the United States to prevent or discover the fraud in the issuance of the checks, or the forgeries, bars recovery against petitioner.

(2) Whether the United States, having given petitioner prompt notice of the discovery of the forgery and demanded payment, is barred from recovery because of delay in instituting action.

STATEMENT

On August 11, 1942, the United States instituted suit against petitioner in the District Court of the United States for the District of Columbia, seeking the recovery of $18,060.83, with interest, as a result of the payment of that amount to petitioner upon its endorsement and guarantee of the genuineness of prior endorsements of 144 checks, on which the signatures of the payees had been forged. Petitioner answered (R. 8–20, 21–22) and the United States moved for judg-

ment on the pleadings (R. 22–23). The facts[1] as disclosed by the pleadings are substantially as follows:

James H. Foley, a civilian clerk in the office of the Paymaster, United States Marine Corps, Headquarters, Washington, D. C., was assigned to prepare Marine officers' pay and mileage vouchers, to prepare checks payable to such officers in payment of such vouchers, to present the checks for signature by the Marine Corps paymaster or other disbursing officers duly authorized to draw checks on the Treasurer of the United States, and to deliver the signed checks to the named payees (R. 10, 15–16, 19). From time to time during a period of 28 months beginning shortly before July 13, 1936, and ending November 14, 1938, Foley forged pay and travel mileage vouchers, together with any necessary supporting travel orders, and prepared 144 checks drawn on the Treasurer of the United States in the amounts set forth in the forged vouchers (R. 9–10). The checks and vouchers were payable to each of 16 actually existing Marine Corps officers, many of whom were stationed in Washington, D. C., and none of whom was entitled to the proceeds of any of the checks or had any knowledge of the fraud (R. 10).

[1] The legal conclusions set forth in the answer of petitioner, many of which are reproduced in its petition, pp. 3–5, were, of course, not admitted by the motion for judgment on the pleadings.

Foley took the checks, vouchers, and travel orders he thus prepared and, without their being subjected to any intervening administrative examination, presented them to the Marine Corps paymaster or other authorized disbursing officers who signed them (R. 10, 14–15). The paymaster and disbursing officers were unaware of the fraud and, relying exclusively on Foley's established reputation for honesty and integrity, signed the checks in good faith without verifying the vouchers or supporting documents (R. 10–11). The signed checks, vouchers, and orders were then returned to Foley for filing and distribution (R. 10).

Foley did not deliver the checks to any of the 16 officers named as payees but forged their signatures as endorsements, added his own name as second endorser, and cashed or deposited the checks at the Anacostia Bank of Anacostia, D. C. (R. 10–11). The Anacostia Bank made no investigation of the genuineness of the payees' signatures but took the checks in reliance upon its confidence in its depositor Foley (R. 11). The Anacostia Bank endorsed each check and transmitted it to petitioner, which in turn endorsed each check and presented it to the Treasurer of the United States who paid the amount thereof to petitioner (R. 12–13). The endorsements of both banks on all checks specifically guaranteed prior endorsements (R. 11–12). Petitioner, upon receiving payment of the several amounts, credited

the collections to the Anacostia Bank and then paid the proceeds to the latter Bank. Thereafter, in November 1938, the Government discovered the forgeries and on December 8, 1938, made formal demand upon petitioner for repayment (R. 13), which was refused. Action was brought by the United States on August 11, 1942 (R. 1).

The District Court entered judgment for the United States on its motion for judgment on the pleadings (R. 23–24). On appeal, the United States Court of Appeals for the District of Columbia affirmed, holding that its prior decision in *Washington Loan & Trust Co.* v. *United States*, 134 F. (2d) 59, was controlling (R. 34).

ARGUMENT

We believe that the decision below is clearly correct on both of the questions presented (see p. 2, *supra*). Because, however, of a conflict with the Circuit Court of Appeals for the Seventh Circuit on the question whether the drawer's negligence in issuing a check or in discovering the forgery of the payee's signature will defeat recovery from the collecting bank which guaranteed its genuineness, we do not oppose the grant of a writ of certiorari on that question.

1. The court below held that the drawer of a check is under no duty to a cashing or presenting bank to exercise diligence in the issuance thereof—here, diligence in preventing or discovering fraud;

that neither the drawer nor the drawee is under a duty to a cashing or presenting bank to discover promptly the forgery of the payee's endorsement; and that the presenting bank which warranted the genuineness of such endorsement is liable to the drawee for the payment received (R. 30–33). This ruling follows the earlier decision of the court below in *Washington Loan & Trust Co.* v. *United States*, 134 F. (2d) 59. We believe that it is fully supported by the decisions of this Court in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, and *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, holding that the United States, as drawee, is entitled to recover payments made under forged endorsements, even though there was unreasonable delay in giving notice after actual discovery of the forgeries, at least where damage to the defendant bank was not shown to have resulted from such delay.

However, the holding of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, is to the contrary.[2] That court denied recovery

[2] There is no merit in petitioner's contention that the decision below also conflicts with *United States* v. *Chase National Bank*, 252 U. S. 485. The critical fact in that case, not made clear in the petition herein, was that the drawer's signature was forged and the check was payable to the order of the drawer. The forgeries were of both the signatures as drawer and as payee. Both the district court (241 Fed. 535) and the Circuit Court of Appeals for the Second Circuit (250 Fed. 105) denied recovery to the United States against

to the United States against a presenting bank which had specifically guaranteed the genuineness of prior endorsements on 22 pension checks payable to the order of a payee who was in fact dead and whose endorsements had been forged. As to 19 checks, prior endorsers had become insolvent before the forgery was discovered, and the court held that the United States knew or should have known of the forgery and accordingly was chargeable with negligence in failing to give prompt notice thereof to the presenting bank which had lost its recourse against prior endorsers. As to 3 of the checks, the defendant bank still had recourse against prior endorsers, and the court similarly held that the Government's negligence in the issuance of the checks precluded recovery. While no fraud was involved in the issuance of the checks in the *First National Bank of Chicago* case, it is inconsistent with the present case in reasoning and result on the issue of the effect of

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the collecting bank on the ground that the check, in the circumstances, was payable to bearer. This Court affirmed, applying the rule of *Price* v. *Neal*, 3 Burr. 1354, which holds the drawee chargeable with knowledge of the drawer's signature and hence precluded, after acceptance or payment, from denying the genuineness of the drawer's signature (252 U. S. at 494). This Court thus merely extended the rule of *Price* v. *Neal* to cover a check payable to the order of the drawer, holding that the added forgery of the payee's signature placed the drawee in no better situation than it occupied by virtue of the acceptance of the forged signature of the drawer. There are other points of difference which the Government is prepared to point out if certiorari is granted.

negligence of the drawer-drawee.[3] Resolution of the conflict should remove an element of uncertainty in respect of the rights and obligations of the United States in its commercial paper, which, at the present time, consists of several hundred million checks a year.

2. Petitioner contends that it should have been relieved of liability because it was prejudiced by the Government's delay in instituting suit. We believe that the court below correctly rejected this contention, and we submit that review thereof by this Court is not warranted because the record fails to support petitioner's contention that it was prejudiced. The Government discovered the forgeries between November 21 and December 5, 1938 (R. 9–10), and petitioner promptly received notice thereof and a demand for repayment on December 8, 1938 (R. 8). There was thus no delay in giving notice of the forgery. Petitioner contends, however, that it was prejudiced by the delay of the United States in instituting suit, because, according to petitioner, the statute of limitations has run in favor of the cashing bank, and if the United States recovers from petitioner, the latter fears that it will be unable to recover in

[3] Since the record there disclosed that the disbursing officers and vouchering officers were ignorant of the fact that the payee was dead, the decision in effect held that the United States was under a duty to exercise care and diligence in the discovery of the forgery.

turn from the cashing bank. There is a dual vice in this contention. Petitioner's pleadings alleged that it was never the owner of the checks but in all instances acted as the collection agent for the Anacostia Bank which had cashed them. As an agent, petitioner's repayment to the United States of the amount of the forged checks would create a right to indemnity from its principal for loss sustained by the agent in exercising the principal's directions. Restatement of Agency, Section 439; *Federal Reserve Bank* v. *Atlanta Trust Co.*, 91 F. (2d) 283 (C. C. A. 5), certiorari denied, 302 U. S. 738; cf. *Hidalgo Steel Co.* v. *Moore & McCormack Co.*, 298 Fed. 331, 334 (S. D. N. Y.). But in any event, the statute of limitations runs only against a cause of action. If petitioner had a cause of action against the Anacostia Bank before payment to the United States, it could have pursued it; if it has no cause of action until it pays the United States or until final judgment is entered against it, its claim against the Anacostia Bank obviously would not be barred. Cf. *Guarantee Title & Trust Co.* v. *Viola State Bank*, 124 Kans. 776.[1]

CONCLUSION

For the reasons stated, the United States does not oppose the granting of the writ. It is re-

[1] After receipt of notice of the forgery, it was the duty of petitioner to take appropriate steps to protect itself. Cf. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296.

spectfully submitted, however, that the writ of certiorari, if granted, should be limited to a review of the first question.

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